

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)	
)	
Review of the Regulatory Requirements)	CC Docket No. 01-337
for Incumbent LEC Broadband)	
Telecommunications Services)	

Reply Comments of DIRECTV Broadband, Inc.

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Summary

DIRECTV Broadband, Inc. submits these reply comments addressing the appropriate and necessary level of regulation of DSL broadband access services provided by incumbent local exchange carriers (“ILECs”). In its initial comments, DIRECTV Broadband demonstrated that SBC’s Petition for Non-Dominant Classification of its tariffed DSL transport service is fatally flawed because it purposefully analyzes the already unregulated retail information services market when the regulations at issue are applied to their regulated *wholesale* transport services. The comments of the large ILECs are substantively nearly identical to SBC’s Petition for Non-Dominant Classification, and therefore DIRECTV Broadband’s initial comments already respond to much of what they have said in their comments. The RBOCs have failed to demonstrate that forbearance of dominant carrier regulation of their wholesale broadband services would be consistent with the public interest. On the central issue in this case, which is the extent of the ILECs’ demonstrable power over its customers in the wholesale broadband market, Qwest offered a couple of brief, unpersuasive arguments, and the other ILECs offered no substance at all. Finally, Verizon’s plea for elimination of all Title II obligations and the Commission’s *Computer Inquiry* open access requirements are beyond the scope of this proceeding and contrary to long-standing Commission policy and the public interest. Therefore, the Commission should maintain and enforce its existing dominant carrier and common carrier regulations on the ILECs’ wholesale broadband services.

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Pursuant to the Commission’s notice of proposed rulemaking issued in this proceeding on December 20, 2001,¹ DIRECTV Broadband, Inc. (“DIRECTV Broadband”) submits these reply comments addressing the appropriate and necessary level of regulation of DSL broadband access services² provided by incumbent local exchange carriers (“ILECs”). In its initial comments filed in this proceeding on March 1, 2002, DIRECTV Broadband demonstrated that SBC’s Petition for Non-Dominant Classification of its tariffed DSL transport service is fatally flawed because it purposefully analyzes the wrong market in an attempt to justify the elimination of critical safeguards in a different, non-competitive market. SBC’s Petition relies solely on a discussion of the market dynamics for *retail* broadband services, while the tariff for which it seeks relief offers only *wholesale* services. DIRECTV Broadband’s comments explained that in the regulated wholesale market in which SBC seeks relief, the ILECs remain completely dominant as suppliers to most broadband services providers, including DIRECTV Broadband. The ILECs’ dominance in this market is easily observed by the manner in which it treats its wholesale customers, as discussed in detail in DIRECTV Broadband’s initial comments. The most meaningful indication

¹ *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Notice of Proposed Rulemaking*, CC Docket No. 01-337, FCC 01-360, (rel. December 20, 2001) (“NPRM”).

² DIRECTV Broadband does not provide frame relay services and has not responded to the ILECs’ comments in the context of these services.

of market power in this wholesale market is provided by SBC's *conduct*, not by its *claims*. SBC's conduct toward its customers could only have taken on this character if there existed no reasonably substitutable wholesale services available to Broadband Services Providers. The facts before the Commission show that if Broadband Service Providers were unable to obtain wholesale Last Mile Connectivity from the ILECs, most would be shut out of the consumer broadband market altogether.³ Therefore, dominant and common carrier regulation of the ILECs' wholesale broadband services remains essential to promote competition and innovation and protect the public interest.

I. The RBOCs Have Failed to Demonstrate that Forbearance of Dominant Carrier Regulation of their Wholesale Broadband Services Would be Consistent with the Public Interest.

The RBOCs' comments are full of broad pronouncements about the importance of a vibrant broadband market to the nation's future, but are largely devoid of any actual analysis of how *dominant carrier tariffing regulation of their wholesale transport services* impedes legitimate broadband objectives. When the RBOCs' argument for forbearance of dominant carrier regulation is analyzed with evidence from the relevant wholesale telecommunications services market, rather than the market for their already unregulated retail information services, their position falters. To forbear from enforcing dominant carrier tariffing regulations, the Commission must find that "enforcement of *such* regulation or provision is not necessary to ensure that the charges, classifications, provisions or regulations by, for or in connection with *that telecommunications . . . service* are just and reasonable and are not unjustly or unreasonably discriminatory."⁴ Clearly, under this inquiry, the first task is to identify the specific regulation at issue, and the specific services that are currently subject to that regulation. As DIRECTV

³ DIRECTV Broadband Comments at 5-7.

Broadband demonstrated in its initial comments, the predominant market to which dominant carrier regulation is currently applied is the wholesale market. Therefore, the Commission's analysis must start there.

The first two relevant considerations are the (1) continued benefit of preserving dominant carrier regulation and ensuring competitive access to wholesale broadband services and (2) the impact of dominant carrier regulation (and not regulation generally) on the wholesale broadband service that is tariffed (and not some other, non-tariffed service). When viewed in this context, the RBOCs have clearly failed to offer any compelling evidence to support forbearance of dominant carrier regulation of their wholesale broadband services.

A. The RBOCs Fail to Prove that Forbearance From Enforcement of Dominant Carrier Regulation of ILEC Wholesale Broadband Service Would Protect the Public Interest and Promote Competitive Market Conditions.

In the context of the wholesale broadband market, SBC is clearly wrong when it asserts that it does not have “the ability to raise and maintain prices above competitive levels without driving away so many customers so as to make the increase unprofitable.”⁵ Indeed, because of the RBOCs' vertical leveraging of its wholesale service in favor of their retail affiliates,⁶ the RBOCs could perhaps make even more money by driving away their unaffiliated customers. Accordingly, most of the RBOCs raised prices in 2001 by approximately 15%, even though their costs of providing the service are falling.⁷

Another nonsensical argument, in the context of the wholesale broadband market, is the RBOCs' assertions that elimination of dominant carrier regulation will enable them to make

⁴ 47 U.S.C. § 160(a)(1) (emphasis added).

⁵ SBC Comments at 9.

⁶ Qwest has apparently made a decision to abolish its retail DSL affiliate Qwest.net and instead sell wholesale service only to unaffiliated information services providers. However, SBC, Verizon and BellSouth have ISP affiliates and their apparent objective is to eliminate their obligation to sell access service to anyone else.

quick price changes that respond to rate changes by their “competitors.” The RBOCs have no significant competitors for the wholesale service that is tariffed.

Similarly ridiculous are BellSouth’s assertions that elimination of dominant carrier regulation in this noncompetitive wholesale market will relieve pricing restrictions that will permit BellSouth to “satisfy consumer demand faster and at lower rates”⁸ and that tariffs are unnecessary because the competitive market can be trusted to make sure rates and terms are just reasonable.⁹ The RBOCs’ wholesale broadband customers aren’t going anywhere for lower prices, because they have nowhere else to go. Therefore, when an RBOC raises its wholesale DSL transport rates, its information service provider customers have only three choices: accept the rate increase, oppose the proposed tariff before it takes effect, or decide to abandon service to customers in the RBOC’s region. If Commission review is eliminated, nothing will operate to ensure that the RBOCs’ rates are just and reasonable. Therefore, the Commission should reject the RBOCs’ arguments that forbearance of dominant carrier regulation of their wholesale broadband services would better enable them to match up against the “competition” in this market.

SBC dismisses as “patently absurd” the suggestion that it can suppress competition by instituting a price squeeze¹⁰ or by discriminating in provisioning to rivals.¹¹ SBC rejects these market risks as “not even a theoretical possibility” on the grounds that the “[ILECs’] competitors

⁷ DIRECTV Broadband Comments at 9.

⁸ BellSouth Comments at 50.

⁹ BellSouth Comments at 51.

¹⁰ As DIRECTV Broadband and others have explained in the past, ILECs can, and in some cases have, priced their wholesale broadband service at a level so close to the prevailing retail that cannot be used competitively as an input by a third-party for its own retail service offering. *See, e.g.*, DIRECTV Broadband Comments at ____.

¹¹ SBC Comments at 52.

do not even use incumbent LEC access services to serve their customers.”¹² Of all of the RBOC positions in this proceeding, this one is the most absurd. The RBOC service at issue in this proceeding is their provision of service to companies that *do* use ILEC broadband access services to serve their customers. Even if the record did not demonstrate the fact that some of the RBOCs have engaged in price squeezes and discrimination to favor their own ISP affiliates – which they have¹³ – the mere fact that no self-effectuating force is in place to prevent such practices demonstrates the continued need for tariffing of the ILECs’ wholesale broadband services.

SBC also argues that dominant carrier regulations have been demonstrated to be unnecessary because it provided broadband services on a detariffed basis for almost two years and allegedly failed to establish market power.¹⁴ However, SBC, BellSouth and Verizon have indeed established significant market power in the retail broadband services market relative to the power of the independent services providers that rely on them for wholesale access. The ISP affiliates of these three respective RBOCs control approximately 80% of the DSL-based retail market in their regions, a remarkable concentration given that these same companies controlled only a single digit percentage of the dial-up Internet access market.¹⁵ Therefore, SBC’s aggregation of market concentration during the period in which it operated without a tariff supports continued dominant carrier regulation, not forbearance.

B. The RBOCs’ Alleged Costs of Dominant Carrier Regulation of their Wholesale Broadband Services Are Overstated.

SBC asserts four alleged costs of dominant carrier regulation of the ILECs’ wholesale broadband services. SBC argues that dominant carrier regulation (1) removes incentives for

¹² SBC Comments at 52-53.

¹³ DIRECTV Broadband Comments at 8-9.

¹⁴ SBC Comments at 48.

¹⁵ DIRECTV Broadband Comments at 8 and n. 12.

rapid price discounting by giving competitors notice of such discounts; (2) reduces or eliminates carriers' ability to make rapid, efficient responses to changes in demand and cost; (3) imposes administrative costs on carriers, which must prepare and file tariffs and Commission staff, which must review them; and (4) limits the ability of customers to obtain service arrangements that are specifically tailored to their needs.¹⁶

The first two assertions are inapposite for the RBOCs' wholesale broadband service because they do not face significant competition in this market. SBC's assertion that if ILECs "attempt to raise rates to unlawful levels, or to engage in unreasonable practices, they will lose customers and revenues to their competitors" is simply not true in the wholesale Last Mile access market, in which the ILECs have no substitutable competitors. Accordingly, tariffing cannot "remove incentives for rapid price discounting," because there are no time-sensitive incentives in any case for the ILEC to discount the prices offered to its wholesale customers. The Commission should ask the ILECs the obvious question: to which competitors will their wholesale divisions lose business if they continue raising rates?

Even where limited competition for wholesale broadband service exists now or may develop in the future, broadband services providers are very unlikely to make short-term, rapid decisions to change suppliers. Unlike circuit-switched local and long-distance services, in which a customer can change carriers repeatedly with a seamless and inexpensive hot cut, changes in a broadband carrier are slow and expensive. A broadband service provider would face expensive new installation costs, changes to network and end-user equipment, and network downtime. These conversions have been typically attempted only when absolutely necessary, such as when NorthPoint went out of business and terminated service. Thus, choice of broadband carriers is far

¹⁶ SBC Comments at 60.

more deliberate than in other areas of telecommunications, and ILECs are in no way disadvantaged by the modest waiting period required under dominant carrier regulation. Therefore, there is simply no basis for BellSouth's assertion that "[t]he broadband mass market will likely unfold as its interexchange precursor, where, according to the Commission described, 'residential and small business customers are highly demand-elastic, and will switch to another service provider to obtain a higher level of performance, functionality, portability, or a lower price.'"¹⁷

The alleged burden of SBC's third and fourth alleged costs of regulation are similarly unpersuasive. While it is true that dominant carrier regulation does impose some additional administrative burdens, the costs of preparing tariffs and cost studies is insignificant when compared to the public's vital interest in ensuring that broadband services providers are able to access the public on rates and terms that are just and reasonable.

Finally, it is galling for SBC-ASI to claim that its tariffing obligations limit its ability to tailor service arrangements to the needs of its customers. In recent years, the only customers that ASI seems interested in meeting the needs of are SBC's retail broadband providers, its affiliated ISPs.

Therefore, there is no basis to conclude that any aspects of dominant carrier regulation are more burdensome than are necessary to promote competition and protect the public interest.

C. Forbearance of Non-Dominant Tariffing Regulation for ILEC Wholesale Service is Unwarranted

As set forth above, ILECs clearly remain dominant in the wholesale market, and only enforcement of dominant carrier regulations to their wholesale services is needed to promote competitive market conditions and protect consumers and the public interest. Relief from these

¹⁷ BellSouth Comments at 41.

regulations would provide no public benefits and would spare the ILECs only of minor administrative responsibilities. By contrast, grant for the request for forbearance would expose independent broadband services providers to risks of continued and increasing pressure from discriminatory price squeezes, and to ongoing persistent provisioning discrimination that has plagued independent broadband providers. Under these circumstances, grant of non-dominant classification could lead to the loss of independent service altogether. Consumers would be the ultimate losers, as the benefits in price, service and innovation brought to the table by these independent service providers would be lost.

Therefore, the ILECs have failed to plead a case for forbearance of these regulations under Sections 10(a) and 10(b) of the Act.

II. Qwest's Arguments Against Independent Review of the Wholesale Market Are Unsound

Although the Notice asks whether the Commission's analysis in this proceeding should "distinguish between retail markets and wholesale markets,"¹⁸ Qwest is the only RBOC that makes more than a cursory attempt to address the wholesale market. However, Qwest's arguments, like other ILEC arguments addressed above, are based on the backwards premise that this central inquiry in this proceeding is on the retail information services market. The primary manner in which the ILECs tariff regulated broadband services is as a wholesale transport service. Therefore, the Commission should not review the retail market and then ask whether there is any remaining reason to study the wholesale market; instead, the Commission's inquiry should start with a study of the wholesale market and then only evaluate the retail market if needed. In this context, Qwest's specific arguments are addressed below.

¹⁸ *NPRM* at 24.

First, Qwest asserts that the wholesale broadband transport “typically consist[s] of precisely the same broadband services that consumers purchase, albeit at larger volumes and therefore at discounted prices.” Qwest’s implication appears to be that wholesale broadband transport is merely a resale of the ILECs’ retail broadband service, and that therefore an independent review of a wholesale market is not needed to protect the public interest. Even if Qwest’s contention were true, the Commission’s public interest inquiry in this proceeding must give weight to the promotion of a competitive market,¹⁹ which would include the benefits of price competition among resellers. However, the importance of wholesale competition goes far beyond resale competition, because, as demonstrated in DIRECTV Broadband’s initial comments, information service providers offer diverse, unique services to customers that can be different from the services offered by the ILEC ISPs.²⁰ Twenty percent of DIRECTV Broadband’s new customers are purchasing such new, value-added services, such as firewall and virus protection programs and other innovative, consumer-oriented applications. If the wholesale market is ignored in this proceeding and the ILECs are permitted to shut the door on independent broadband services providers, the public’s substantial interest in the development of new and competitive broadband services will suffer.

Qwest also notes that wholesale DSL broadband transport is now available in some cases from cable and satellite providers. However, this assertion on its own is insufficient to demonstrate that the ILECs lack market power in the wholesale market. Even Qwest admits that cable companies are only “reluctantly” starting to offer “some degree of access to unaffiliated ISPs.” As DIRECTV Broadband demonstrated in its initial comments, independent broadband services providers are not able to rely in cable or satellite alternatives to provide ubiquitous, cost-

¹⁹ 47 U.S.C. §160(b).

effective service to consumers.²¹ Indeed, the record is very clear that the ILECs hold substantial market power in the wholesale market, as demonstrated by the RBOCs' conduct toward their independent wholesale DSL customers. While these wholesale customers of the ILECs' tariffed services have emphasized this fact above all others in their comments,²² the RBOC comments merely try to shove the wholesale market under the table. The RBOCs devote pages and pages of analysis and affidavits addressing the availability of cable and satellite alternatives in the irrelevant retail market, but submit only Qwest's vague and unhelpful two sentences on the existence of competition in the wholesale market, which is the regulated market for which the RBOCs are seeking deregulation.

Finally, Qwest argues that the wholesale market is not a separate market because any regulatory concerns regarding the wholesale market are subsumed by regulatory protection of the retail market. Qwest's assertion relies upon the footnote in SBC's Crandall/Sidak affidavit ("SBC Affidavit") that DIRECTV Broadband refuted in its initial comments,²³ and on a footnote from the Commission's order approving the merger between America Online and Time Warner. Neither of these examples offers compelling support for Qwest's argument for the Commission to ignore the wholesale market.

Qwest argues that the SBC Affidavit supports the conclusion that the RBOCs cannot impose above-market prices for their wholesale services because their rates are "constrained by the price elasticity of demand of the retail broadband service." It does not require an economics degree to realize that this statement is patently irrelevant where there is no competition in the

²⁰ See, e.g., DIRECTV Broadband Comments at 14.

²¹ DIRECTV Broadband Comments at 5-7.

²² DIRECTV Broadband Comments at 2-12; Earthlink Comments at 4-19, 22-28.

²³ DIRECTV Broadband Comments at 4; see also Earthlink comments at 15-16.

wholesale market and when wholesale monopolists favor particular retailers that they cross-subsidize. It is true that if ILECs attempted to charge \$100 for their wholesale service when the prevailing retail rate was \$50 that they would not have any customers, other than their own paper affiliates. But unlike a wholesaler not vested with an interest in favoring particular retailers, it is also true that at least some ILECs might be pleased, rather than disappointed, if all of their nonaffiliated customers simply went away. The RBOCs have an obvious incentive to favor their own affiliates, while Qwest has an incentive to favor MSN, which pays Qwest an undisclosed commission for each MSN subscriber Qwest obtains for MSN.²⁴ These ILEC-affiliated or allied retailers do not need to fear paying above-market wholesale rates when they can be compensated through untariffed commissions or through cross-subsidization by a common parent company. Price elasticity in the wholesale market is an irrelevant concept when the wholesaler (or its parent company) would ultimately benefit if the elastic were stretched until it breaks.

Unchecked by regulation, SBC and other ILECs in the same position would be fully capable of ensuring that only the ILEC-affiliated Broadband Services Provider in each region can succeed. What this means, for the purposes of this proceeding, is that the economics of the wholesale broadband market cannot simply be assumed to have been addressed by an evaluation of the retail market.

Qwest's attempt to extrapolate meaning from the second paragraph of footnote 202 in the Commission's AOL-Time Warner Order is a stretch that overstates and mischaracterizes the Commission's intent. Review of the complete Order makes it clear that the Commission was indeed concerned, and should remain concerned, about the ability of information services

²⁴ Qwest has an incentive to favor MSN, which pays Qwest an undisclosed commission for each MSN subscriber Qwest obtains for MSN. See *Petition of Qwest Corporation for Declaratory Ruling Clarifying that the Wholesale DSL Services Qwest Provides to MSN Are Not "Retail" Services Subject to Resale Under Section 251(c)(4) of the Act*, WC Docket No. 02-77, Petition for Declaratory Ruling (April 3, 2002), Exhibit A at ¶ 11.

providers to obtain wholesale broadband access to the nation's businesses and consumers at reasonable and non-discriminatory rates and terms. As the Commission stated:

We find that if unaffiliated ISPs were permitted to offer their services over AOL Time Warner's cable network on non-discriminatory terms and conditions, the merger's potential to undermine competition in the relevant market would be mitigated. Unaffiliated ISPs in areas served by AOL Time Warner's cable network would have the opportunity to compete fairly on price and quality, and residential consumers in these areas would be able to choose a high-speed ISP based on the best combination of those characteristics. Market forces, not control of a bottleneck facility, would determine the firms that would succeed in the relevant market, thereby enhancing efficiency and consumer welfare.²⁵

These are not the words of a Commission that, according to Qwest, had decided conclusively that the ILECs' rates for wholesale broadband need not be monitored because they are constrained by price elasticity in the allegedly competitive retail broadband market.

Therefore, the Commission should reject the argument that the ILECs' market power in the wholesale market should be ignored. Once the Commission chooses to examine the ILECs' market power in the wholesale broadband market, it is clear that dominant carrier regulation in that market remains appropriate and should be continued to protect the public interest and promote competition.

III. SBC Continues to Undermine Public Interest Objectives of Dominant Carrier Regulation by Seeking Special Permission to Waive the Regulations for Every Tariff Modification

In its comments, DIRECTV Broadband explained that the entire issue in this proceeding is moot if SBC and other ILECs are continually able to escape dominant carrier regulation simply by seeking special permission for every tariff amendment they proposed, no matter how significant.²⁶ Unfortunately, nothing appears to have changed since DIRECTV Broadband's

²⁵ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion and Order, FCC 01-12 (rel. January 22, 2001) at ¶ 92 (internal footnotes omitted).

²⁶ DIRECTV Broadband Comments at 16-18.

comments were filed. On April 10, 2002, SBC filed yet another request for special permission, which the Commission promptly granted.

The changes effected by ASI's tariff filings have included *significant* price increases, reduced transmission speeds, and new counterproductive network architectures that would undermine competing services. All of these changes have been made by SBC without filing any cost support. SBC's conduct in abusing the DSL tariff process highlights the type of abuse SBC's customers will suffer if the Commission eliminates dominant carrier regulation.

SBC has now operated for more than seven months under rates not supported by cost data, despite numerous complaints throughout the broadband services industry. There is no justification for continuing to allow the entirety of ASI's service to forever escape cost support regulations that are in effect today. Without further delay, the Commission should order SBC-ASI to file cost support for its F.C.C. Tariff No. 1, and in the future the Commission should grant special permission requests, if at all, only in extraordinary circumstances, and only when it is absolutely clear that there is no adverse change in the proposed tariff modifications.

IV. Verizon's Requests for Exemptions from Widely-Applicable Title II and *Computer Inquiry* Regulations Are Beyond the Scope of this ILEC-Specific Proceeding

As DIRECTV Broadband explained in its initial comments, the obligations established by the Sections 201 and 202 of the Act and the *Computer Inquiry* regulations apply to all facilities-based carriers, both dominant ILECs and non-dominant CLECs. Therefore, a finding that ILECs are non-dominant in provision of broadband telecommunications services would no relevance to continued application of Title II and *Computer Inquiry* obligations. There is clearly no evidence to suggest that ILECs are entitled to any regulatory relief above and beyond the regulations applied to other local exchange common carriers. Any review of these requirements should therefore be conducted in the Commission's generic wireline Broadband proceeding, and not in

this ILEC-specific proceeding. Three of the four RBOCs appear to agree, and have not seriously challenged these broader regulations in this proceeding. However, Verizon's comments argue that the Commission should exempt ILEC broadband services from Title II regulation and the equal access regulations established in the *Computer Inquiries*. DIRECTV Broadband will address these issues more fully in its comments in the Broadband proceeding; however, this issue is so critical to the survival of competition in the broadband services market that it cannot ignore some of the contentions put forward by Verizon in this docket.

Verizon argues that ILECs should no longer be required to allow independent information services providers to access its network to reach their customers. Verizon claims that "these regulations were based on the premise that local telephone companies possessed market power in the traditional voice business."²⁷ On the contrary, the *Computer Inquiries* were not based on market power – the open access rules apply to even the smallest of facilities-based local exchange carriers, and even when a customer can be served by the facilities of multiple facilities-based carriers. Indeed, ILECs are required to offer non-discriminatory access to information services providers even if they decide themselves not to participate in the retail market, just as ILECs are required to provide access to interexchange carriers.

Verizon seeks not only to avoid dominant carrier regulation, but also an exemption altogether from the requirement under Section 201 to offer access at rates that are just and reasonable.²⁸ Verizon argues that it should be able to develop pricing plans that would recover in excess of cost basis by charging based on such factors as the number of times a customer accesses a particular website. However, the pricing issues that Verizon describes are relevant only to the already unregulated retail information service offered by Verizon's ISP affiliate(s).

²⁷ Verizon Comments at 3.

Verizon is already free to price its information services any way it wants. By contrast, Verizon has not demonstrated any need for greater pricing flexibility for its wholesale DSL transport offering. Verizon's interest in the flexibility to charge rates for its wholesale telecommunications services that are unjust and unreasonable provide a clear illustration of what will happen in the wholesale DSL "market" if the Commission reverses course on decades of open access policy.

Sections 201 and 202, and the principles of nondiscriminatory access, are cornerstones of the nation's telecommunications policy, and for good reason. As DIRECTV Broadband explained in its initial comments, the real value of broadband pipes is in the new services that will be possible to deliver over broadband networks in the future, and not in the infrastructure itself.²⁹ The most significant hurdle to consumer broadband penetration in the United States is not deployment – it is high prices and lack of compelling broadband services available today. Millions of Americans have access to broadband but choose not to buy it. In a speech last year, Chairman's Powell noted that broadband is available to almost 85% of the population, but only 12% of these households have chosen to subscribe.³⁰ On this observation, he explained:

[B]roadband is not a speed. It is a medium that offers a wide potential set of applications and uses. With the telephone, we knew what the "killer app" was. It was voice. The "broad" in broadband should be recognized as meaning more than the "fat, fast pipe." It should represent the nearly infinite possible uses and applications that might be developed and that a consumer might use.³¹

Development of this "nearly infinite" range of possible uses of broadband should not be expected from a very finite list of facilities-based infrastructure providers. The creative energy and investment resources needed to develop compelling broadband content and the "killer"

²⁸ Verizon Comments at 41.

²⁹ DIRECTV Broadband Comments at 18-19.

³⁰ See <http://www.fcc.gov/Speeches/Powell/2001/spmcp110.html>.

³¹ *Id.*

applications that will drive broadband's future will be chilled considerably if the transport providers are able at will to dictate the terms, *if any*, under which independent service providers can access customers. The infrastructure companies, which are focused on deployment and with their own traditional core services to protect, should not be depended upon to be the sole drivers of the future of broadband services and applications.

The RBOCs cite in support of deregulation the recent study by TechNet promoting broadband deployment. While the TechNet report undoubtedly emphasized the value of encouraging last mile facilities deployment, it also recognized the critical importance of enabling competitive information services providers to access consumers using local loops from the LECs. In the press conference in which TechNet's study was released, Rick White, the CEO of TechNet, explained that open access to bottleneck local loops remained essential. When asked whether TechNet endorsed keeping the local loop open to competitors, Mr. White explained:

I think what our report basically says is that we think an open competitive marketplace at the local loop and frankly every place is important . . . we would endorse opening the loop as much as possible. We absolutely do endorse and recommend that there's as much competition in the local loop as absolutely is possible. We think that's really the key to success here.³²

Therefore, the key to success depends on not only on investment in broadband infrastructure, but on a healthy and competitive market for competitively-priced and compelling broadband services. Continued application of basic Title II obligations, including the provision of service to all comers at just, reasonable and non-discriminatory rates and terms, remains essential for the broadband information services market to grow and thrive.

Much has been said recently of the value of allowing the free market to pick the winners and losers in the broadband information services market. The ILECs are right that the

³² TechNet CEOs Call for National Broadband Policy, Press Conference Transcript (January 15, 2002) at 23, <http://www.technet.org/news/newsreleases//2002-01-15.62.phtml>.

Commission should not pick the winners and losers; for the Commission to be right, however, it must also conclude that the dominant facilities-based carriers should not be entrusted to pick the winners and losers either. Instead, consumers and businesses should be able to choose from the widest possible variety of services and providers in order to select the best possible services to meet their needs and exceed their expectations. Only with that freedom to choose can the promise of broadband be delivered. Therefore, the Commission should reject Verizon's request for an exemption from the fundamental common carrier obligations set forth in Title II and the *Computer Inquiry* regulations.

V. Conclusion

The RBOC comments rely almost exclusively on their fundamental distortion of what dominant carrier regulation is, and of what service are and are not that subject to it today. Once the Commission places the proper focus of this proceeding on the ILECs' wholesale broadband services, it is clear that the Commission should not forbear from continued application of dominant carrier regulation of these services, and should not exempt ILECs from fundamental common carrier obligations set forth in Title II and the *Computer Inquiry* regulations.

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